

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAMIE ACOSTA,,

Petitioner,

v.

F. GONZALEZ, Warden, et al.,

Respondent.

Civil No. 11cv2618 DMS (BGS)

**REPORT AND
RECOMMENDATION RE:
DISMISSING PETITION WITHOUT
PREJUDICE AND WITH LEAVE TO
AMEND**

Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) Respondent notes that Petitioner previously filed a Petition in this Court regarding the same claims at issue in the present Petition. (Doc. No. 4.) Respondent asked the Court to construe this Petition as another motion to amend in Case Number 11-cv-1313-DMS (BGS). (*Id.*) Respondent also requests that the Court deny the motion to amend as futile. (*Id.*)

On February 22, 2012, however, Judge Sabraw adopted this Court's report and recommendation in 11-cv-1313-DMS and dismissed the petition, as well as denied the motion to amend without further leave to amend. (*See Acosta v. F. Gonzalez*, 11cv1313-DMS (BGS)[Doc. No. 23].) Accordingly, on February 22, 2012, Petitioner's case, 11-cv-1313-DMS, was closed. (*Id.* at Doc. No. 24.) Thus, it is not appropriate to treat the instant Petition as

1 motion to amend in Case Number 11-cv-1313-DMS. Rather, the Court finds it appropriate to
2 dismiss the Petition as duplicative.

3 DUPLICATIVE PETITION

4 In his Petition, Acosta challenges his San Diego County Superior Court conviction in case
5 number SCD133742 alleging (1) the restitution fine portion of his sentence was imposed in
6 violation of the “constitutional prohibition against ex post facto laws,” and (2) his “procedural
7 bar” is not independent of federal law and inadequate under California law.” (Pet. 6-7.)
8 Petitioner already had a petition for habeas corpus pending before this Court in which he
9 challenges the same San Diego Superior Court conviction in case number SCD133742 and raises
10 the same claims. (*See Acosta v. F. Gonzalez*, 11cv1313-DMS (BGS)[Doc. No. 1].) In that
11 case, Respondent filed a Motion to Dismiss that was granted on February 22, 2012. The Court
12 may dismiss a duplicative petition as frivolous if it “merely repeats pending or previously
13 litigated claims.” *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (citations
14 omitted). Because the current Petition merely repeats claims already raised in Case Number
15 11cv1313-DMS (BGS), the Petition is dismissed as duplicative.

16 CONCLUSION AND RECOMMENDATION

17 The Court submits this Report and Recommendation to United States District Judge Dana M.
18 Sabraw under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for
19 the Southern District of California. For all the foregoing reasons, **IT IS HEREBY RECOMMENDED**
20 that the Petition be **DISMISSED** in its entirety on grounds that it is duplicative. **IT IS FURTHER**
21 **RECOMMENDED** the Court issue an Order: (1) approving and adopting this Report and
22 Recommendation; (2) entering an order DISMISSING the petition without leave to amend; and (3) the
23 court DECLINE to issue a certificate of appealability.

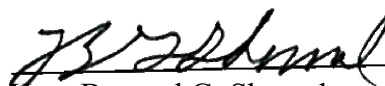
24 **IT IS HEREBY ORDERED** no later than September 14, 2012, any party to this action may
25 file written objections with the Court and serve a copy on all parties. The document should be captioned
26 “Objections to Report and Recommendation.”

27 **IT IS FURTHER ORDERED** any Reply to the Objections shall be filed with the Court and
28 served on all parties no later than October 5, 2012. The parties are advised that failure to file objections

1 within the specified time may waive the right to raise those objections on appeal of the Court's Order.
2 *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th
3 Cir. 1991).

4 **IT IS SO ORDERED.**

5 DATED: August 23, 2012

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7 Hon. Bernard G. Skomal
8 U.S. Magistrate Judge
9 United States District Court
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